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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. [redacted] 57

VICENTE MORENO,

Petitioner,

vs.

THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 735

VICENTE MORENO,

Petitioner,

vs.

THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI

The petitioner, Vicente Moreno, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled cause on November 7, 1950.

Opinion Below

The opinion of the Court of Claims (R. 18-31) has not been reported.

Jurisdiction

The judgment of the Court of Claims, as amended, was entered on November 7, 1950 (R. 32). A motion for a new trial, reasonably filed, was denied on the 9th day of January 1951. This Court extended the time to May 10, 1951, in which

to file this petition. The jurisdiction of the Court is invoked under the provisions of Section 3(b) of the Act of 1925, 43 Stat. 939, as amended.

Statement

Petitioner is a naturalized citizen of the United States. He enlisted in the United States Army in the Philippine Scout Unit on March 3, 1924, and served continuously in that capacity (R. 18) until his retirement by the United States Army on February 28, 1950, for which he was awarded full credit for *active service* from the time of his enlistment in 1924, for a period of 25 years, 11 months and 28 days.

Petitioner was appointed Second Lieutenant on May 28, 1936, and was taken prisoner by the Japanese Army on April 9, 1942, when they captured the Philippine Islands. (R. 19)

Petitioner reported to the United States Army on January 28, 1945 when they reconquered the Philippines, and served with the United States Army until his retirement on February 28, 1950.

The United States Army made a determination of petitioner's status as to his loyalty during the war, and on *December 7, 1945* found,——

> "* * * that his activities during the Japanese occupation of the Philippines did not constitute an abandonment of loyalty to the United States and that he be retained in service, have been approved."

The United States Army paid petitioner his pay and allowances from January 28, 1945, the time he reported back to military control, until his retirement on February 28, 1950, but denied his pay and allowances from October 1, 1942 to January 1, 1945, when the Japanese Army occupied

the Philippines. The Army made seven conflicting determinations as to petitioner's status, with the same findings of fact (R. 4-5), and at all times holding that petitioner was loyal to the United States.

Petitioner filed an action in the United States Court of Claims on July 23, 1948 to recover his back pay and allowances. (R. 1-17)

The Court of Claims dismissed the petition on June 5, 1950 on the sole ground that under the concluding clause of sec. 846 of Title 10 U. S. C., enacted March 30, 1814, 3 Stat. 115, R. S. sec. 1288, petitioner was not entitled to recover. It is significant to note that when the Army made its determination in this matter, it relied for guidance upon sec. 1288 revised statutes 10 U. S. C. 846 and not upon any provisions of the so called Missing Persons Act.

The Court of Claims reversed its holding as to the above statute, after considering petitioner's motion to set aside its judgment, and held that it did not apply to this petitioner, but that, under the Missing Persons Act, the decision of the representative for the head of the Army denying petitioner's claim was not subject to judicial review (R. 31), as the determination "• • • includes *legal* as well as factual elements, and Congress must have meant, by section 1009 as a whole, *that the troublesome questions* arising under the Missing Persons Act were not to be the subject of litigation." (R. 31) The Court of Claims then dismissed the petition as a matter of law, (R. 26) but did not pass upon petitioner's right to receive his pay and allowances, while a member of the United States Army, his contractual rights provided by the Constitution, or his rights under the Administrative Procedure Act, which provided for judicial review for all determinations made by the heads, or their subordinates, of administrative agencies, including the Army.

Statutes Involved

The Tucker Act, as amended by 28 U.S.C.A. section 1348; the Administrative Procedure Act, 5 U.S.C.A. sections 1001-1011; Pay Allowances, 37 U.S.C.A. sections 1-31, and 231-319, and sections 671-915, and the Missing Persons Act, 50 App. U.S.C.A. 1001-1017, of which all pertinent parts will be quoted in our brief attached hereto and made a part hereof.

Questions Presented

1. Whether the decision of the War Department, through its subordinates, was final and conclusive and deprived the Courts of judicial review, as to both factual and legal determinations.

2. Whether the Department of the Army may decide, contrary to the admitted facts, and the clear import of the language of the statutes and the Constitution of the United States, that a soldier of the United States Army may be deprived of his contractual rights as to his pay and allowances, while a member of the United States Army, when found by the United States Army to be loyal at all times during his service.

Reasons for Granting Writ

The decision of the Court of Claims is in conflict with the decisions of this Court, the Statutes, the Constitution and the provisions of the Administrative Procedure Act, in holding that the administrative determination by the Army board in the Philippine Islands is conclusive, final and not subject to judicial review, as to *"legal as well as factual elements"*, even though the facts are contrary to the conclusion of law decided by the Army and the Court of Claims.

The Court of Claims' decision in denying petitioner's claim to his back pay and allowances is contrary to the decisions of this Court, the United States appellate courts and even the Court of Claims' decisions, which hold that when a person enlists in the Army or Navy of the United States he is entitled to his pay, and a denial by the Army or Navy may be reviewed by the Courts. (*U. S.* v. *Grimley,* 137 U. S. 127; *McCord* v. *Page, etc.* 124 F. 2d 68; *Campbell* v. *Oliphant,* 206 S. W. 2d 406, and *re Miller* 51 A. 2d 745, 356 Pa. 56; *Bowman* v. *U. S.,* 10 Ct. Cls. 408; *Wilson* v. *U. S.* 25 Ct. Cls. 339; *Conrad* v. *U. S.,* 32 Ct. Cls. 139; that the right to maintain an action in the Courts by a member of the United States Army or Navy has never been questioned. (Id.)

The Court of Claims' last decision in denying petitioner's claim is based upon petitioner's rights under the Missing Persons Act (and did not pass upon petitioner's contractual rights) and holds that it could not decide whether or not the decision of the Army was arbitrary or capricious in denying petitioner's claim. This is in conflict with the Missing Persons Act and the decision of this Court in the *Standard Oil Company* v. *U. S.,* 339 U. S. 158 in which this Court took judicial notice of the fact that the Japanese Army, for all practical purposes, was in *complete control* of the Philippine Islands by May 1942, and continued in control until sometime subsequent to October 1944. As petitioner was "in the hands of the enemy", as found by the Army and the Court of Claims, and was not officially determined absent from his post of duty without authority, the Army had no right to deny petitioner's claim.

Petitioner's rights, in a case like this, have not been decided by this Honorable Court, and it is evident that the Court of Claims is confused as to its jurisdiction under the Administrative Procedure Act, 5 U.S.C.A., sec. 1001-1011.

Conclusion

It is respectfully submitted for the reasons stated above, and as stated in our brief attached hereto that petitioner's writ be granted.

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Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 735

VICENTE MORENO,

Petitioner,

vs.

THE UNITED STATES,

Respondent

BRIEF FOR PETITIONER

The (a) *Opinion Below,* (b) *Jurisdiction,* (c) *Statement,* (d) *Statutes Involved,* (e) *Questions Presented* and (f) *Reasons for Granting the Writ,* set forth in the petition are made a part hereof by reference, and will be dealt with as we believe necessary for the court's consideration.

Statement

Petitioner, a naturalized citizen of the United States enlisted in the United States Army on March 3, 1924, in the Philippine Scouts, a unit and part of the United States Army. He served *continuously* in that capacity until his retirement by the United States Army in February 1950.

He was appointed a Second Lieutenant in 1936 and was serving in that capacity when he was captured by the Japanese on April 9, 1942 (R. 18, 19).

The Japanese Army had complete control of the Philippines from May 1942 until subsequent to October 1944.[1]

When the United States Army reconquered the Philippines, petitioner reported to the United States Army on January 28, 1945 (R. 22) and served continuously until his retirement in 1950.

The United States Army, in its written opinion dated December 7, 1945, found that petitioner's

> "* * * activities during the Japanese occupation of the Philippines did not constitute an abandonment of loyalty to the United States, and that he be retained in service, * * *." (R. 21.)

Petitioner was paid by the Army his full pay and allowances from the time he was able to return to the United States Army on January 28, 1945 until his retirement, but the Army refused to pay petitioner for the period from October 1, 1942 to January 1, 1945.

The Army board in the Philippines made seven determinations as to petitioner's status in its conclusions of law, or ultimate findings in conflict with its findings of fact, which are not in dispute.

The findings, that petitioner was loyal to the United States during his captivity, made by the Army on December 7, 1945, quoted above, were never changed (R. 21-26).

General J. M. Wainwright on May 7, 1942, issued an order, as authorized by General MacArthur, for all the

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[1] This Court took judicial notice of the above fact in the case of *Standard Oil Company* v. *U. S.*, 339 U. S. 158.

United States Army in the Philippines to surrender (R. 22, 23), which was followed by General Sharp's order of May 11, 1942 (R. 23-24) and Colonel Hilsman's order, *in conformity thereto,* in which he ordered,—

"MESSAGE TO ALL FILIPINO OFFICERS AND MEN

1. Direct written orders have been received by me from General Sharp, and authorized by General MacArthur for me to surrender the Forces of Negroes.

2. These orders have been obeyed by this Headquarters and as a member of this command you also must obey them.

3. Failure to surrender classifies you as:

a. Deserter by Philippine and U. S. Governments—
Penalty—Death

b. Outlaw by Imperial Japanese Army—
Penalty—Death

4. By terms of the agreement the Imperial Japanese Army has been furnished:

a. Your name and home address.
b. Your present location.
c. The arms and ammunition you have.

5. *By surrendering you will draw full pay until you are mustered out of the Service and you will be entitled to all bonus and insurance privileges from USAFFE.* You will also be recognized as an HONORABLE prisoner of War by the Philippine Government, USAFFE and by the Imperial Japanese Army and treated as such.

6. Half of the Officers and men have already reported to Fabrica and are well treated.

7. Report in PERSON with your arms and ammunition to Cadre Barracks in Fabrica BEFORE midnight Wednesday, May 27th.

8. By complying with these orders you will SAVE YOUR HONOR, YOUR LIFE and ASSURE the safety of your family and friends.

ROGER HILSMAN,
Colonel, Inf. U.S.A. Commanding"

General MacArthur issued an order dated December 8, 1944[2], as follows,—

The Army board in the Philippines finally held (contrary to General MacArthur's order, issued by Colonel Hilsman

---

[2] General MacArthur, by letter dated 30 August 1950, as Supreme Commander for the Allied Powers informed the Philippine Government as follows:

"Republic of the Philippines

DEPARTMENT OF FOREIGN AFFAIRS

File No. 130.16

Manila, September 15, 1950.

SIR:

With reference to your radiogram of August 5, 1950, requesting certain information from General Douglas MacArthur to be utilized in the test case of Vicente Moreno v. The United States in the United States Court of Claims, I enclose two photostatic copies of General Douglas MacArthur's letter, dated August 30, 1950, regarding the matter.

Very truly yours,

(Sgd.) FELINO NERI,
Acting Secretary.

Enclosure: Two photostatic copies of letter dated August 30, 1950.
The Honorable Joaquin M. Elizalde, Philippine Ambassador, Washington, D. C.
Certified True Copy. (Signature.) Chief of Records. 9/28/50.

• • • • • • •

GENERAL HEADQUARTERS

SUPREME COMMANDER FOR THE ALLIED POWERS

Office of the Supreme Commander

30 August 1950.

DEAR DR. BERNARDO:

I have reviewed the material enclosed with the communication from Honorable Felino Neri, and done my best to recall the exact circum-

(R. 24-25), and General MacArthur's order of December 8, 1944 (R. 25-26), that petitioner was not entitled to his pay from October 1, 1942 to January 1, 1945, because he was permitted to be employed in the Philippines controlled by the Japanese, during which time he was assisting the guer-

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stances which prompted the issue of the letter of 8 December 1944 from Headquarters United States Forces in the Far East to Chief of Staff, Philippine Army. The lack of records here and the time lag involved make it impossible for me to give conclusive evidence in this matter. It is my recollection, however, that the order was intended to eradicate any impression of a differential treatment between members of the Philippine Army and those of the Philippine Scouts. Unquestionably they should be treated on the same basis as regards this general subject.

Please assure Mr. Neri of my continuing interest in the fortunes of the Philippine veterans and of my willingness for him to put this letter to any appropriate use.

Sincerely,

(S.) DOUGLAS MACARTHUR.

Dr. Marcelino V. Bernardo,
Philippine Mission in Japan,
Rooms 501 and 502
Hattori Building,
Tokyo, Japan.

"HEADQUARTERS

UNITED STATES ARMY FORCES IN THE FAR EAST

321 — (8 Dec 44) FEPA APO 501

8 December 44

SUBJECT: Status of Members of the Philippine Army

To: Chief of Staff, Philippine Army

1. All officers and enlisted men of the Philippine Army including the Philippine Constabulary, who have been called into the service of the United States Army Forces in the Far East, remain on that status until relieved therefrom by orders issued by the Commanding General, USAFFE. Action by these individuals in surrendering to the enemy forces in conformity with orders issued by their commanders, or in refusing to surrender, has no effect on such status.

2. Any "parole" or "oath" signed by such personnel as a condition of release by the enemy from prisoner of war status will be considered as having been signed under duress and as of no validity. Such personnel remains subject to the orders of the Commanding

rillas, because such employment in the aid of the United States was not "upon authorization of a recognized guerrilla commander".

Statutes Involved

1. The Tucker Act, as amended, Section 1346, Title 28 U. S. C. A.,

> "(a) The District Court shall have original jurisdiction concurrent with the Court of Claims * * *."

2. Pay and Allowances, as amended, Title 37 U. S. C. A., Sections 1-31 and 231-319; section 671-915.

3. The Administrative Procedure Act of June 11, 1946, 60 Stat. 253, 5 U. S. C. A., 1001-1011,

> "Sec.1009. Judicial review of agency action.
>
> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.
>
> Rights of review
>
> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved

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General, USAFFE, and will be assigned to appropriate duty in the Philippine Army units.

By command of General MacArthur:

(S.) G. E. TOMBERLIN,
1"Lieutenant, AGO,
Asst. Adjutant General.

Copies:
GHQ
CG, Sixth Army
CG, 8th Army
CT, FEAF
CG, USASOS
CT, 14th AA Command
Staff

Copies from the true copy of: Captain Ramon Camagay.
RICARDO V. NAVARRO,
3" Lieutenant, Inf.,
6" RC, 1" RB (PA) Apo 72".

by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action * * * in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *"

4. The Missing Persons Act, Title 50 App. U. S. C. 1001-1017,

"1002. Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a neutral country, *captured by an enemy, beleaguered or besieged,* shall for the period he is officially carried or determined to be in such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled to thereafter * * *."

"Provided further, That there shall be no entitlement to pay and allowances *for any period during when such person may be officially determined absent from his post of duty without authority* and he shall be indebted to the Government for any payments from amounts credited to his account for such period." (Id)

Section 1006 of the above Act provides that when a person is found to be,

"alive and in the hands of *an enemy*"

that he is entitled to the benefits under the Act, while, Section 1014, provides,

> "Section 1014. Application of Act to persons besieged by the enemy. The provisions of this Act *applicable* to persons in the hands of an enemy shall also apply to any person beleaguered or besieged by enemy persons. * * *."

ARGUMENT

Petitioner's Contractual Rights

Are the Courts denied the right to review the determination of an Army board in the Philippines, where the facts are not in dispute and the board clearly disregards the law, whereby a soldier is deprived of his pay and allowances while a member of the United States Army?

The answer to the above question is obviously,—*no*. This Court in *U. S.* v. *Grimley*, 137 U. S. 147, and all other courts where the question has been raised, have held that when a person joins the United States Army or Navy, he has a contract with the United States Government and neither he nor the United States can set aside or avoid the rights of either parties. (*McCord* v. *Page*, 124 F. 2d 68; *Campbell* v. *Oliphant*, 206 S. W. 2d 406; *re Miller*, 51 A. 2d 745, 356 Pa. 56; *Bowman* v. *U. S.*, 10 Ct. Cls. 408; *Wilson* v. *U. S.*, 25 Ct. Cls. 339; *Conrad* v. *U. S.*, 32 Ct. Cls. 139.)

As stated in the cases cited above, never have the Courts denied a member of the United States Army his pay, or denied the Court's right to judicial review in upholding a soldier's contractual right for his pay, when found by the

Army that the soldier was loyal to the United States during the period involved.

The Missing Persons Act

The above Act did not take away petitioner's right to his pay and allowances while a member of the Philippine Scouts, a part of the United States Army.

Petitioner's rights to his pay and allowances were established by law when he enlisted and from that time, and thereafter there was a binding contract between him and the United States, which entitled him to his pay for all times until he was discharged.

The Missing Persons Act did not take away petitioner's contractual rights, but only added to other persons' rights to pay under that Act, as defined therein. Even under the above Act, the head of the Army Department had no right to deprive petitioner of his pay under the facts found by its designated head.

The Court of Claims upheld the Government's contention that—

> "* * * the final determination of the Commanding General, hereinabove referred to, that the plaintiff was not in a casualty status during the period here in question was and is conclusive, and that the correctness of that determination cannot be reviewed in a court" (R. 30).

The Congressional Reports show conclusively that it was not the intent of Congress in amending the Missing Persons Act to give to the head of the Department the unlimited license to act irrespective of restraint, or to deprive the Court of the right to review the determination in conformity with the intent and provisions of the statute. The conclusive determination was limited to the findings of facts as set forth in the Report and was for the purpose of pre-

venting a conflict in the findings made by the administrator in the foreign field and the accounting officers, General Accounting Office here.

The Report of the House of Representatives, 78th Congress 2nd Session, Report No. 1674, amending Act of March 7, 1944 (Missing Persons Act) to accompany H. R. 4405, clearly shows that Congress intended to make the findings of the head of the department, or by such subordinate as he may designate, final and conclusive only to "determination of administrative and fiscal matters that arise in the broad field of casualty administration * * *. They are requisite to such matters as evaluation of reports and information, the status of individuals, essential dates, appropriable debits and credits to individual accounts in casualty cases, waiver of overpayments, and facts of dependency" (Report, page 7).

Under the Act of 1944, before amendment, the language used "throws practically all cases open to interpretation by the accounting officers as to whether within the scope of the authority granted." The amendment removed those defects (Report, page 7).[3]

The Report pointed out that the provision as to "determinations * * * of entitlement * * * to pay and allowances * * * shall be conclusive." (Id. p. 8, 50 U. S. C. A. App. Sec. 1009.) This was added because—

> "Many situations have arisen and more are anticipated in which some determinations, *conclusive upon the accounting officers* of the Government, must be made of credits and debits to the account of missing per-

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[3] The Hearings (No. 241) on said Report No. 4405, held June 13, 1944, clearly show that Congress did not intend to deprive the courts of judicial review, but were to protect the soldier as far as possible so he "*would not have to go to the Court of Claims*" and to prevent the General Accounting Office from overruling the Department's findings of fact. See Pages 2321, 2322, 2324, 2326.

sons. There are questions of rank, grade, classification of civilian employees, entitlements to allowances of various kinds, debits on account of allotments or family allowances, and the periods of various credits and debits. All of this can best be determined and should be determined by the head of the department concerned. The department should have authority utilizing its knowledge of military and administrative conditions and circumstances to determine whether a *promotion* has been made, whether entitled to *rental* allowance, whether *monetary allowances* for quarters is payable, *the rate of pay of civilian* employees and many *other questions arising through loss or inadequacy of individual records.* This provision grants the authority to make all such determinations" (Report No. 1674, page 8).

It is clear from the above report that the determination vested as conclusive was confined to findings as to the above facts, and not to vest anyone with the conclusive authority to determine that claimants were not in casualty status and not entitled to their pay and allowances when they were "in the hands of the enemy" during the period the Philippines were occupied by the Japanese, which would be contrary to the clear provisions of sections 1002, 1006 and 1014 of the Missing Persons Act.

The amendment to the Act of 1944 also made it plain that the determination could not charge claimants with any amount they received while in the hands of the enemy, by such enemy (Page 9 of Report; Section 1009 of Title 50, Appendix). In claimants' cases they were deprived of their entire pay and allowances when they received less than living wages from the puppet agency.

Mr. F. L. Yates, attorney conferee, Comptroller General's Office made a statement before the Senate Committee on Naval Affairs on February 12, 1942, pages 41, 42—hearings, and although it refers to Sections 10, 11 and 12, we

believe it covers Section 9 and explains the powers granted to the departments, as follows:

"Section 10 would make final and conclusive the determination of the head of the department, or such other person whom he might designate, on any question of status of a person in the military service. Now, we take that to mean the status with respect to whether he is missing, missing-in-action, on duty at a beleaguered post, or held by a neutral power, and so forth.

"SENATOR GILLETTE. It is a question of fact?

"Mr. YATES. Yes, as to his status. Section 11, the first one to which you referred, makes the authority of the head of the department, or someone designated by him, final and conclusive as to the fact of dependency. Now that goes to the wife, the children, or other dependencies of a person in the military or naval service. That is the determination of the fact of that dependency under the provisions of this act. Now that part of it in the first two lines of section 11 of the present draft of the bill would authorize such determination as to any dependencies affected by any provisions of this pending act, but the section goes on and says, 'The determination of the fact of dependency under the provisions of this act and the determination of the fact of dependency under the provisions of any and all other laws providing for the payment of pay, allowances, or other emoluments to enlisted men of the services'. So it goes apparently further as to dependencies of enlisted men than we thought was intended when we read the first copy of the bill. Further, this apparently is necessary, as far as the purposes of this particular bill are concerned. However, Mr. Warren, the Comptroller General, did not see fit in his report to raise that particular question.

"Now, in the General Accounting Office, we can see no particular objection, in an emergency measure, such as this, to accord the head of the department authority to determine finally the question of *fact* as to dependency with respect to the cases or the persons or the situations covered by this bill."

The Missing Persons Act of 1942 was amended July 1, 1944. Section 9 of the Act was amended in order to permit a more efficient and expeditious administration of the Act (See Vol. 90, Part 3 of 78th Congress, 2nd Session, of Congressional Record, pages 6483, 6484.)

Persons denied the benefits of the Missing Persons Act should be limited to those "absent without authority" as provided by sub-paragraph 2 of Section 1002 Missing Persons Act, 50 U.S.C.A. This is the only exception set forth in section 1002, which contains the basic provisions of the Act. Any exception set by such a law, limiting the effects of the general rule, must be construed strictly in accordance with a well established rule of statutory construction that exceptions listed down in legislative enactments should be construed against the inclusion of something not expressly included in the exception. (59 Corpus Juris, p. 984, sec. 582)

Sub-paragraph 2, section 1002 which limits the general rule has been officially interpreted in War Department letter to the Commander-in-Chief, AFWESPAC, Subject: Discharge of disloyal Philippine Scouts and similar personnel, and determination of their status under the Missing Persons Act as amended, dated 3 August 1945. Section 1, paragraph 3 reads: "The Secretary of War's direct authority is granted to the Commander-in-Chief, Army Forces, Pacific, under the provisions of the Missing Persons Act, as amended, to make a determination of 'absent from post of duty without authority' for Filipino personnel covered by paragraphs 1 and 2 above, when there is reasonably conclusive evidence of intent to avoid or shirk combat or hazardous duty or abandonment of loyalty."

The offense absent from post of duty without authority can be established only if either of these two conditions can be proved by conclusive evidence: (1) Attempt to avoid or

shirk combat or hazardous duty; (2) abandonment of loyalty.

In petitioner's case, there has been no charge against him that, at any time during his service as an officer in the Philippine Islands, he was AWOL. On the contrary, a determination was made that at all times, he was loyal to the United States. It is petitioner's contention that this is the only exception, which could support the determination made by the Army.

THE ADMINISTRATIVE PROCEDURE ACT
(5 U.S.C.A., Sec. 1001-1011)

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against *arbitrary official encroachment on private rights.*" (*U. S.* v. *Morton Salt Co.*, 94 L. Ed. 364, 365.)

We, therefore, proceed to an analysis of this statute as set forth in the opinion of Judge Holtzoff, 75 Supp. 902:

Section 2 (a) of the Act defines the extent of the statute. It in effect provides that the Act applies to each authority of the Government of the United States, except the Congress, the Courts, the territorial governments, and the District of Columbia. For certain purposes, it also excepts courts-martial and military commissions as well as military or naval authority exercised in the field in time of war, or in occupied territory. It also excludes functions performed under the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, and the Surplus Property Act of 1944. The Army Department, therefore, is not exempted from the provisions of the statute, except in respect

to military authority exercised in the field in time of war or in occupied territory, and in respect to courts-martial. All other activities of the Army Department, including the one involved in this case, are within the scope of the Act.

Subsection (a) confers the right to secure a judicial review on any person adversely affected or aggrieved by any agency action within the meaning of any relevant statute. The effect of this provision is, on the one hand, to exclude from the right of judicial review all Governmental action affecting the public generally, but not impinging on the legal rights of any individual; and, on the other hand, to permit an appeal to the courts by any person whose individual legal rights are adversely affected. Obviously, the Petitioner is aggrieved by the defendant's denial of his claim and, therefore, is accorded the privilege of a resort to the courts.

Subsection (c) provides that every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.

The conclusion is inescapable that under the Administrative Procedure Act every final agency action is subject to judicial review at the behest of any person whose legal rights are adversely affected, unless the action is taken under a statute precluding judicial review, or unless the agency action is by law committed to agency discretion.

In this connection, it is desirable to consider sub-section (b) of Section 10, which provides that the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence of inadequacy thereof, any 'applicable' form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent

jurisdiction. In other words, if there is provided an adequate specified statutory review proceeding in respect to any specified agency action, this form of proceeding should be pursued. In the absence or inadequacy of any such proceeding, recourse may be had to any applicable form of legal action. By the word "applicable" is meant "appropriate or suitable".

Consequently, the aggrieved party may invoke any suitable or appropriate form of proceeding or remedy.

Thus the Report of the Senate Committee on the Judiciary (S. Rept. No. 752, 79th Congress) submitted by Senator McCarran, states that the legislation "sets forth a simplified statement of judicial review designated to afford a remedy for every legal wrong." This Report in discussing Section 10 (a) makes the following observation:

"Any person suffering legal wrong because of any agency action, or adversely affected within the meaning of any statute, is entitled to judicial review.

"This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."

The Report contains the following comment in respect to Section 10 (c):

"Agency action made reviewable specially by statute or final agency action for which there is no other adequate judicial remedy is subject to judicial review."

A similar statement is found in the Report of the House Committee on the Judiciary (H. Rept. No. 1980, 79th Cong., 2d Sess.).

Section 10 (e) of the Administrative Procedure Act, which relates to the scope of judicial review, authorizes the reviewing court to decide all relevant questions of law

and to set aside agency action found not to be in accordance with law. *(Rear Admiral W. A. Buck* vs. *Madeleine Ursula Snyder,* U. S. District Court Opinion, 75 Fed. Supp. 902)

So far as the petitioner has been able to ascertain, every Circuit Court of Appeals that has had occasion to consider the question has held (sometime by way of dictum) that the Administrative Procedure Act gives an increased right of judicial review. See: *Eastern Utilities Associates et al* v. *Securities and Exchange Commission,* 162 F. (2) 385 (1st C. C. A.); *Ohio Power Co.,* v. *National Labor Relations Board,* 164 F. (2) 275 (6th C. C. A.); *Lincoln Electric Co.* v. *Commissioner,* 162 F. (2) 379 (6th C. C. A.); and *United States ex rel Trimler* v. *Carusi,* 166 F. (2) 457 (3rd C. C. A.).

The Court in the *Carusi* case, *supra,* page 460, held that although the Statute provided that "decision of the Attorney General shall be final," that it is not final in the sense that the Courts cannot do anything about it, in light of the additional authority given under the Administrative Procedure Act.

In the present case, the facts conclusively show that from the time the Japanese Army occupied the Philippines, until the time they were reoccupied by the United States Army, petitioner and all other soldiers in the Philippines were in the hands of the enemy. The Court of Claims in its first opinion stated,—

> "We assume, without deciding that a prisoner paroled as the plaintiff was, in his homeland which was occupied by the enemy was 'in the hands of an enemy' as those words are used in Section 1006. (page 13)"

The department's evidentiary findings show beyond question that petitioner was in the hands of the enemy from the time of his capture until the United States reoccupied the Philippines. Furthermore, that he was a prisoner of war

during the above period as stated in General MacArthur's Order of 8 December 1944 (R. 25-26 of Opinion),

> "• • • parole is not a termination of imprisonment. It is subject to termination at any time." (*Nagle* v. *Lim Foon*, 48 F. 2d, 51)

Since the department's representative determination that petitioner was not in casualty status while the Japanese occupied the Philippines, is unsupported by substantial evidence, it is "of course, arbitrary and capricious and may always be set aside." (*National Labor Relations Board* v. *Minnesota Mining and Mfg. Co.*, 179 F. 2d 323, opinion by Judge Sanborn, 8th Cir.)

In the case of *U. S.* v. *Carmack*, 329 U. S. 245, although the Court stated that it was unnecessary to determine whether or not the action taken by the Federal officials by the Condemnation Act could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so "capricious and arbitrarily" that their action was without adequate determining principle or was unreasoned, as the record did not raise such issue, the Court defined "arbitrary and capricious," footnote 14, page 244 as follows:

> "Arbitrary" is defined by Funk & Wagnalls New Standard Dictionary of the English Language (1944). as '1. Without adequate determining principle; . .' and by Webster's New International Dictionary, 2d ed (1945), as '2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasoned; . . . .'
>
> "Capricious" is defined by Webster's New International Dictionary, 2d ed (1945) as '2. Apt to change suddenly; freakish; whimsical; humorsome.' Cf. *Fox Film Corp.* v. *Trumbull* (DC) 7 F. 2d 715, 727; *Puget Sound Power & L. Co.* v. *Public Utility Dist.* (CCA 9th

Wash) 123 F. 2d 286, 290 writ of certiorari denied in 315 U. S. 814, 86 L ed 1212, 62 S Ct. 798; *United States* v. *Eighty Acres of Land* (DC 111) 26 F. Supp. 315, 319. See also *United States* v. *Certain Parcels of Land* (DC Md) 30 F. Supp 372, 379; *United States* v. *Parcel of Land* (DC Del) 32 F Supp 718, 721."

As stated in the case of *U. S. v. Carusi*, 166 F. 2d 457, 461, "Statutes which preclude judicial review are unusual." An example is the Economy Act of 1933, Title 38, U. S. C. A., Sec. 705, which provides,

> "All decisions rendered by the Administrator of Veterans affairs * * * shall be final and conclusive *on all questions of law and fact and no other official or court of the U. S. shall have jurisdiction to review by mandamus or otherwise any such decision.*"

The above section was held to be valid since retirement pay is a gratuity which Congress may withdraw *(Barnet* v. *Hines,* 105 F. 2d 96).

It is significant to note that the Court, in the above case, reviewed all of the discussions found in the legislative history of the Act pertinent to the exceptions found in Sec. 10 of the Administrative Procedure Act. The Court calls attention to the fact that Congressman Walter pointed out to the House of Representatives that this clause (Statutes preclude judicial review) was simply put in to provide for the unusual situation, where judicial review of administrative action was *actually precluded.* (See Legislative history Senate Document 248, 79th Congress, 2nd Session page 380)

Back pay due petitioner under the Missing Persons Act was due him as a contractual obligation of the government and not as a gratuity. (*Campbell* v. *Oliphant,* 206 S. W., 406, 185 Tenn. 415; in re Miller estate 51 A 2d 745, 356 Pa. 56)

In the case of *U. S.* v. *Babcock,* 250 U. S. 328, (cited in *Dismuke* v. *U. S.,* 297 U. S. 170, 172) the Act provided,—

> "That any claim *provided* which shall be presented and acted on under authority of this Act shall be held as finally determined *and shall never thereafter be reopened or considered.*"

In *Estep* v. *U. S.,* etc. 327 U. S. 114, the Court held that although the Act provided that decisions of local draft boards *shall be final,* that if the determination was contrary to the provisions in the Act, it was subject to judicial review, as the determination would be in defiance of the law.

In the present case where the facts show that petitioner was in the hands of the enemy, and the Act provides that he is entitled to pay and allowances during that period, the determination made that he was not entitled to pay and allowances is in defiance of the Act and subject to judicial review, as held in the case above.

A Soldier's Right to His Pay

The pay and allowances are fixed by Statutes, 37 U. S. C. A., Sections 1-31 and 10 U. S. C. A. sections 671 etc. The pay of an officer cannot be withheld under Section 277 of Title 10 U. S. C. A., when he is acting under an order he is bound to obey, (in re Smith Ct. C. 209), or except for certain violations set forth in the above Acts, none of which petitioner is charged with.

The Court, in its opinion, we respectfully submit, has misconstrued the Missing Persons Act, and the other Statutes as set forth above, overruling petitioner's contention,——

> "* * * if the undisputed facts show that the person in question was in a certain status" (in the hands of the enemy) "the department could not conclusively determine that he was not." (R. 31 of Opinion)

and in holding that the second provision in Section 1009, as follows,——

> "* * * Determinations are authorized to be made by the head of the department concerned * * * of entitlement of any person, under the provision of this Act, to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive * * *.

is conclusive and not subject to review by the Courts. (Id.)

We believe that the Court, after reading and considering this Brief, in which the intent of Congress is shown by its Committee's Report, the Administrative Procedure Act, and the case applicable thereto, that the Court will reverse the Court of Claims' decision and find in favor of petitioner.

It is inconceivable to believe that Congress, in passing the Missing Persons Act, intended to deny pay and allowances to a soldier in the service of the United States, after he was ordered to surrender to the brutal and cruel Japanese enemy in the Philippines; but if he were *interned in a neutral country,* be entitled to pay and allowances.

The Committee's Report, set forth above, shows conclusively that Congress did not intend to provide that petitioner could not be deprived of his pay and allowances under the facts found in this case.

The Court of Claims must have dismissed petitioner's claim on the basis of its decision in the case of *Patterson* v. *U. S.,* 115 Ct. Cls. 348, in which it decided that it did not have jurisdiction as to the taking of lands by the Department of Interior, and could not, under this Court's decision, *U. S.* v. *Jones,* 336 U. S. 641, review the decision of that department. However, the Court did recognize the jurisdiction given by the Administrative Procedure Act, and stated that under the Act it would seem to give the Courts "apparently the United States District Courts to which the

Act gives jurisdiction in such cases, plenary powers to shape judicial review to fit the case. We conclude, therefore, that jurisdiction is in those Courts and not in this Court to right wrongs which petitioner charges in the petition."

We believe that the lower court erred in our decision and that there must be some Court in which a soldier is entitled to judicial review of a decision by a subordinate of any department, when it is clearly contrary to the law.

In addition to petitioner's rights to his pay, this is a test case, which all the Philippine soldiers and citizens are depending upon the United States to pay them for their services, and it is very important that the United States fulfill its contractual rights with them.

Conclusion

For the foregoing reasons it is respectfully submitted that this Court, in the exercise of its jurisdiction, should correct the injustice caused by the decision below, by vacating the judgment of the Court of Claims and remanding the case to that Court with directions to that Court to grant petitioner a judgment as a matter of law, since the facts are not in dispute.

Respectfully submitted,

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